Supreme Court, U.S.
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80-62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

ELIOT H. WEISMAN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX B

UNITED STATES of America, Plaintiff,

v.

Gregory J. DePALMA, Eliot H. Weisman, Richard Fusco, a/k/a "Nerves", Murad Nersesian, a/k/a "Mike Fusco" and "Mickey Coco", Leonard Horwitz, a/k/a "The Fox", Laurence I. Goodman, Salvatore J. Cannatella, Louis Pacella, a/k/a "Louie Dome", Anthony Gaggi, a/k/a "Nino", and Thomas Marson, Defendants.

No. 78 Cr. 401.

United States District Court,
S. D. New York.

Aug. 25, 1978.

SWEET, District Judge.*

The Indictment in this action was filed on June 2, 1978 and alleges a pattern of racketeering activity by the defendants centering on the corporate enterprise known as the Westchester Premier Theatre ("Theatre") (Count One), a securities fraud (Counts Two through Twelve), a bankruptcy fraud (Counts Thirteen through Twenty-three) and an obstruction of justice (Count Twenty-four). The events giving rise to the charges occurred over a period from 1971 through 1978. The Indictment resulted from extensive electronic interceptions, data obtained from informants, and the admissions of certain of the

* At the request of the Court portions of the original opinion that have little precedential value have been omitted. The footnotes and internal divisions of the opinion have been renumbered.

defendants. There are ten defendants named. Not surprisingly defendants have filed extensive pretrial motions challenging the adequacy of the various counts of the Indictment, the propriety of joinder of the counts in the Indictment, seeking severance, dismissal of certain counts as a consequence of prosecutorial misconduct, striking certain material from the Indictment, requesting a bill of particulars, production of documents for inspection, and seeking a continuance.[1] This court has previously ordered evidentiary hearings relating to (1) the Government's compliance with the sealing and minimization requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520, (2) the suppression of certain statements by defendant Weisman, and (3) the use of the Government of allegedly immunized testimony of defendant Weisman. The matters requiring evidentiary hearing will be dealt with in a subsequent opinion.

For the reasons set forth below, the motions to dismiss the Indictment, for misjoinder and severance are denied. The motion to strike certain matters from the Indictment, for a bill of particulars, document inspecting and for a continuance are granted to the extent set forth below.

I. COUNT ONE CHARGES AN OFFENSE.

Count One charges defendants, Weisman, DePalma and Fusco with violating 18 U.S.C. §1962 (c);[2]

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[1] Each defendant has sought the benefit of the motions made by co-defendants. Reference will be made to a particular defendant's motion for the sake of clarity with the understanding that the discussion applies to all motions thus adopted.

[2] 18 U.S.C.A. § 1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

("RICO"), in that they are alleged to have participated in a pattern of racketeering activity[3] in the conduct of the affairs of the Theatre through the commission of acts of securities fraud and bankruptcy fraud. Section 1962(c) is part of Title IX of the Organized Crime Control Act of 1970 (Public Law No. 91-452).

Title IX, entitled Racketeer Influenced and Corrupt Organizations, proscribes, *inter alia,* "the operation of any enterprise engaged in interstate commerce through a 'pattern' of 'racketeering activity.' " H. R. Rep. No. 1549, 91st Cong., 2nd Sess. *reprinted in* 2 U.S.Code Cong. & Ad.News, pp. 4007, 4010 (1970). Section 1961(1) of Title IX defines racketeering activity to include bankruptcy and securities fraud. A review of the legislative history relating to this statute evinces the concern of Congress in eliminating the influence of organized crime activities in our society. The Senate Report on the Organized Crime Control Act states as follows:

> Obviously, the time has come for a frontal attack on the subversion of our economic system by organized criminal activities. That attack must begin, however, with the frank recognition that our present laws are inadequate to remove criminal influences from legitimate endeavor organizations.
>
> * * * * * *
>
> Title IX recognizes that present efforts to dislodge the forces of organized crime from legitimate fields of endeavor have proven unsuccessful. To remedy this

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[3] 18 U.S.C. § 1961(5) "defines 'pattern of racketeering activity' to require at least two acts of racketeering. . . . One act in the pattern must be engaged in after the effective date of the legislation. As amended by the Committee, the two acts necessary to establish the pattern must occur within a period of 10 years, excluding any period the perpetrator was in confinement." H. R. Rep. No. 1549, 91st Cong., 2nd Sess. *reprinted in* 2 U.S.Code Cong. & Ad News, pp. 4007, 4032 (1970).

> failure, the proposed statute adopts the most direct route open to accomplish the desired objective. Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

S. Rep. No. 617, 91st Cong., 1st Sess. 78-79 (1969). This attitude was consistently endorsed in both the House and the Senate during hearings on this bill. It is in this context that the defendants' motions must be viewed.

A. *The Indictment Properly Alleges a Pattern of Racketeering.*

Defendant Weisman asserts that in order to establish a violation of 18 U.S.C. § 1962(c) the two acts of racketeering activity necessary to establish a "pattern" must be related. Claiming that the activities with respect to the alleged securities fraud are not related to the activities of the alleged bankruptcy fraud, Weisman seeks dismissal of Count One. The motion is denied.

The statutory definition of pattern of racketeering activity is unambiguous and contains no reference to any requirement of "relatedness." A review of the legislative history establishes that Congress was concerned with proscribing illegal activities of legitimate business, and that the only relation it deemed necessary for the two predicate acts is that they both be in the conduct of the affairs of the same enterprise. 18 U.S.C. § 1962(c)(1970).[4]

[4] "A 'pattern of racketeering activity' means simply two or more acts of racketeering activity, one of which . . . must have occurred subsequent to the enactment of the title." 116 Cong. Rec. H35, 295 (daily ed. Oct. 7, 1970) (remarks of Rep. Poff).

Two significant amendments to the definition of pattern of racketeering, prior to the enactment of the statute, lend further support to this view. Prior to these amendments the definition was as follows: "The term pattern of racketeering activity includes at least one act occurring after the effective date of this chapter." S. Rep. No. 617, *supra* at 122. Since "the term 'pattern' indicates that what is intended to be proscribed is not a single isolated act of 'racketeering activity,' but at least two such acts" (*id.*) the statute was amended to read as follows: "The term 'pattern of racketeering activity' means at least two acts, one of which occurred after the effective date of this chapter." *Id.* There was no requirement that the two acts be related to each other. In fact, at that point there was no requirement that the two acts even be related in time. This was the cause of some concern to those who commented on the proposed bill. *See e.g.* 116 Cong. Rec. S855 (daily ed. Jan. 22, 1970)(analysis of American Civil Liberties Union). Such concerns led to the enactment of the ten year limitation in the statute. It was this ten year limitation that provided any requirement of nexus between the two predicate acts. In its final form the statute simply required that the person commit at least two acts of racketeering activity within a ten year period.

Considering the time and effort spent by Congress on this definition, had it wanted to provide for any "relatedness", it had ample opportunity to do so. Instead Congress must have realized that the definition of "pattern of racketeering activity" would necessarily be interpreted in the context of the statute to which it applies (18 U.S.C. §1962). Thus, the term "pattern", when used in this context, applies to the relationship of the acts to the enterprise, and no more. The definition of "racketeering activity" in the section and the additional definition of "pattern of "racketeering activity", taken together, results

in the conclusion that the "pattern" definition states a minimum but not necessarily an exclusive definition. A main focus of Title IX was the enterprise,[5] not only the persons committing the acts, and Congress felt that the "pattern" would be supplied by this common factor.[6]

This interpretation was accepted by the court in *United States v. Elliott,* 571 F.2d 880 (5th Cir. 1978).

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[5] It was noted during the Congressional hearings that

"While prosecutions and convictions of leaders of organized crime and their confederates are increasing each year as the Federal Government's organized crime program gains momentum, it is becoming increasingly apparent that such convictions alone, which simply remove the leaders from control of syndicate-owned enterprises but do not attack the vested property interests whose control passes on to other Cosa Nostra leaders, are not adequate to demolish the structure of the surviving organizations which they run. The legislative proposals contained in title IX of this act, entitled 'Racketeer influenced and corrupt organizations,' constitute a carefully structured program which can drastically curtail—and eventually eradicate—the vast expansion of organized crime's economic power which operates outside the rules of fair competition of the American marketplace."

116 Cong. Rec. S607 (daily ed. Jan. 21, 1970) remarks of Sen. Byrd.

[6] "Subsection (5) defines 'pattern of racketeering activity' to require at least two acts of racketeering activity, as defined above.

The concept of 'pattern' is essential to the operation of the statute. One isolated 'racketeering activity' was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

The concept 'pattern' is thought to provide no due process constitutional barrier to criminal sanctions, as a 'racketeering activity,' defined above, must be an act in itself subject to criminal sanction and any proscribed act in the pattern must violate an independent statute. *See United States v. Nardello,* 393 U.S. 286 [89 S.Ct. 534, 21 L.Ed.2d 487] (1969)."

S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969). The term "pattern" was thus intended to be read as part of the whole statute and not separately. Continuity (the two alleged frauds) plus relationship (the Theatre) exists here.

The Fifth Circuit there noted that the Organized Crime Control Act

> does not criminalize either associating with an enterprise or engaging in a pattern of racketeering activity standing alone. The gravamen of the offense described in 18 U.S.C. §1962(c) is the conduct of an enterprise's affairs through a pattern of racketeering activity. Thus, the Act does require a type of relatedness: the two or more predicate crimes must be related to the affairs of the enterprise but need not otherwise be related to each other.

Id. at 899 n.23. This analysis is consistent with the legislative history. *United States v. Parness,* 503 F.2d 430, 438 and 442 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975) is also apposite in this regard. There, predicate acts of the RICO charge were three separate violations of 18 U.S.C. §2314, all steps in a scheme to take over a hotel. Although these violations arguably had a greater nexus than merely steps in the common scheme, "there is no indication in *Parness* that the Court of Appeals requires anything more for the establishment of a 'pattern' within the meaning of §1961(5) than two acts of racketeering . . ." *United States v. Moeller,* 402 F. Supp. 49, 58 n.7 (D.Conn.1975). Indeed, it has been noted in this district, in dictum, that "[t]here is no constitutional principle that would prevent Congress from labeling the commission of two crimes within a specified period of time and in the course of a particular type of enterprise a 'pattern' of activity, whether or not a sequence of two similar acts amounts to a pattern as that term is ordinarily understood." *United States v. Field,* 432 F.Supp. 55, 60-61 (S.D.N.Y.1977).

Defendant Weisman relies heavily on the opinion in *United States v. Stofsky,* 409 F.Supp. 609 (S.D.N.Y.1973)

in support of his contention that the two acts themselves must be related in a greater degree than just to the affairs of the same enterprise. Although some of the language in *Stofsky* would support this position, the holding in the case does not go this far. In determining the constitutionality of 18 U.S.C. §1962(c) the court in *Stofsky* stated that "[t]his Court therefore construes the word 'pattern' as including a requirement that the racketeering acts must have been connected with each other by some common scheme, plan or motive so as to consititue a pattern and not simply a series of disconnected acts." *Id.* at 614. But this should not mean that the acts themselves must be interrelated. The common scheme or plan must be supplied in each instance by the enterprise, in the conduct of whose affairs the acts must be committed. Congress, after long analysis and debate, defined the term "pattern". Had Congress intended the definition of "pattern" used in 18 U.S.C. §3575(e)(also part of the Organized Crime Control Act), which the court in *Stofsky* used to cast light on the §1961(5) definition of "pattern", it could have specifically provided for such.[7] Instead Congress determined that the "enterprise" would be the common bridge between the two predicate acts and therefore specifically did not provide any other requirement or test of interrelatedness.[8]

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[7] 18 U.S.C. § 3575(e) defines "pattern of criminal conduct" as follows:

> ". . . Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

[8] The court in *Stofsky* seems to acknowledge this when it states: "Set forth, then, on the face of the statute is a necessary connection between the person who would commit the enumerated predicate acts and the enterprise, and between the acts and that person's participation in the operations of the enterprise."

It is perhaps reassuring, however, to note that the definition of "pattern" as set forth in 18 U.S.C. §3575(e) has been met here, for the criminal acts alleged had the same "purposes", "participants", and are interrelated by "distinguishing characteristics and are not isolated events." The characteristics are the use of an apparently legitimate enterprise, the Theatre, as a vehicle to provide benefits to the participants in the pattern as a consequence of concealed criminal acts. If Congress intended this definition to be read into §1961(5) it should have said so; but even if it had, the Indictment remains sufficient.

In *United States v. White,* 386 F.Supp. 882 (E.D.Wis.1974), cited by defendant Weisman, the court was concerned that absent a showing of a pattern or interrelatedness, 18 U.S.C. §1962(c) could be used against the isolated acts of an independent criminal; therefore the two acts "must have a greater interrelationship than simply commission by a common perpetrator." *Id.* at 883. This court agrees that more than a common perpetrator is needed. However, the additional element is satisfied by a showing that the predicate acts were both committed in the conduct of the affairs of the same enterprise or business, therefore possessing a distinguishing characteristic, and are not isolated. *See generally* S. Rep. No. 617, 91st Cong., 1st Sess. (1969); 116 Cong. Rec. H35, 196 and H35, 197 (daily ed. Oct. 6, 1970).

Indeed the dictionary definition of pattern, whether in terms of a dress pattern or model, or a pattern of shot, implies separate, discrete elements which are placed together in a whole, a conception consistent with Congress' intent to deal with organized crime.

The Indictment here satisfies the definition of "pattern of recketeering activity"; both frauds are alleged to

have been committed in the conduct of the Theatre's affairs and related to the essential functions that the Theatre served in the regular conduct of its affairs. *See United States v. Ladmer,* 429 F.Supp. 1231, 1245 (E.D.N.Y. 1977).

In fact, the alleged frauds are of exactly the type with which Congress was concerned when it enacted the Organized Crime Control Act. As noted by Senator Thurmond during hearings on the bill,

> One of the favorite devices of organized crime is to infiltrate a company, build it up, and then let it go broke so that it can take advantage of certain tax provisions and other devices thus disposing of or protecting a large treasury of illegally obtained dollars. This provision will help in curbing this activity.

116 Cong. Rec. S953 (daily ed. Jan. 23, 1970). Congress recognized that "[i]in business, the mob bleeds a firm of assets, then takes bankruptcy" (176 Cong. Rec. S591 (daily ed. Jan. 21, 1970) (remarks of Sen. McClellan)) and sought to protect the public from such occurrences. It is this type of situation which is alleged in this case.

Furthermore, even if the term "pattern" requires that the predicate acts themselves be interrelated, such exists between the alleged frauds:

> (i) Defendants Weisman, Fusco and DePalma allegedly were each involved in both frauds.
>
> (ii) The frauds allegedly were with respect to the same entity.
>
> (iii) The stock fraud allegedly defrauded investors in the sale of the securities. The bankruptcy fraud allegedly defrauded these same investors, who would have been entitled to any remaining assets in

the event the Chapter XI reorganization was successful.

(iv) The frauds allegedly had the same common goal of enriching those in control of and related to the theatre through the use of illegal acts.

(v) Both frauds allegedly were committed well within the statutory requirement of ten years.

(vi) The alleged skimming activities bridge the gap between the securities fraud and the bankruptcy fraud, implying that both were anticipated by those in control of and related to this enterprise. Although the alleged skimming activities here cannot be considered in themselves, as predicate acts necessary to prove a RICO violation, they still may be considered to prove a nexus between the two frauds. *Cf. United States v. Frumento,* 426 F.Supp. 797, 803 (E.D.Pa.1976), *aff'd,* 563 F.2d 1083 (3d Cir. 1977), *cert. denied,* 434 U.S. 1072, 98 S.Ct. 1258, 55 L.Ed.2d 776 (1978) (jurors could consider acts of bribery as proof of motive, opportunity, intent, plan, knowledge and absence of mistake or accident although such could not be considered as constituting the pattern of racketeering activity). The Indictment sufficiently alleges a pattern of racketeering activity.

* * *

IV. COUNT XXIV WILL NOT BE DISMISSED.

Defendants Weisman and Horwitz seek dismissal of Count XXIV of the Indictment. Horwitz asserts a violation of his Fourth Amendment rights; both Weisman and Horwitz claim that their Sixth Amendment rights were violated and that any criminal activity to obstruct justice resulted from entrapment by the Government.

Horwitz's claim that use of informant Brodsky to record his conversations subsequent to his grand jury testimony violated his Fourth Amendment rights is without merit. The conversations were with a person who was cooperating with the Government; Horwitz had no Fourth Amendment protection that a person with whom he was conversing would not then or later reveal the conversation to legal authorities. *United States v. White,* 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed2d 453 (1970); *Hoffa v. United States,* 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). Horwitz was not under indictment at the time (*Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)); there is no persuasive authority for the proposition that his testimony before the grand jury, and his invocation of his Fifth Amendment privilege, with counsel present, affords him a constitutionally protected expectation of privacy from that time forward.

[8] The alleged violation of the Sixth Amendment rights of Horwitz and Weisman is equally without authority. Reliance on *Massiah v. United States, supra,* is misplaced, for *Massiah* was concerned with post-indictment statements obtained without presence of counsel. "[I]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby v. Illinois,* 406 U.S. 682, 688, 92 S.Ct. 1877, 1881, 32 L.Ed.2d 411 (1971). No case has come to this court's attention which has held that a defendant's testimony before a grand jury constitutes such proceedings. The arrest of Weisman on another unrelated charge does not alter the situation, that charge having been dismissed prior to any of the conversations here in question. *See United States v. Hinton,* 543 F.2d 1002, 1014—15 (2d Cir.), *cert. denied,* 429 U.S. 980,

97 S.Ct. 493, 50L.Ed.2d 589 (1976); *United States v. Missler,* 414 F.2d 1293, 1302—03 (4th Cir. 1969), *cert. denied,* 397 U.S. 913, 90 S.Ct. 912, 25 L.Ed.2d 93 (1970); *United States v. Edwards,* 366 F.2d 853, 872—73 (2d Cir. 1966), *cert. denied,* 386 U.S. 919, 87 S.Ct. 852, 17L.Ed.2d 782 (1967). The motions premised upon alleged violations of the Fourth and Sixth Amendment rights of Horwitz and Weisman are denied.

Defendants' claim that this court should dismiss Count XXIV of the Indictment due to the conduct of the Government in obtaining the evidence against then (an entrapment defense) is untimely. The law of entrapment was set forth by the Supreme Court in *Sorrells v. United States,* 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 511 (1932):

> It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and strategem may be employed to catch those engaged in criminal enterprises. [Citations omitted.] The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design. * * * A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

Id. at 441—42; 53 S.Ct. at 212—13. Therefore, where the defense of entrapment is asserted, two questions of fact arise:

> (1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and

> was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it.

United States v. Viviano, 437 F.2d 295, 298 (2d Cir.), *cert. denied,* 402 U.S. 983, 91 S.Ct. 1659, 29 L.Ed.2d 149 (1971). These are usually questions for the jury. *See e. g. United States v. Quinn,* 543 F.2d 640, 647 (8th Cir. 1976).

However, Weisman and Horwitz assert that apart from any predisposition by them to commit the crime charged in Count XXIV, the Government's participation in the crime was so outrageous as to deprive them of their right to counsel and constituted such prosecutorial impropriety as to deprive them of the due process of law and that therefore, as a matter of law, they were entrapped. The Supreme Court has stated that someday the situation may be presented "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial process to obtain a conviction." *United States v. Russell,* 411 U.S. 423, 431—32, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1972); *see also Hampton v. United States,* 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1975) (concurring and dissenting opinions). This day has not arrived for Weisman and Horwitz. Although the Government sought by use of its informer to confirm its view of defendants' conduct and to encourage them to seek to obstruct justice, this court cannot conclude, at this stage of the proceedings, that it was so outrageous as to deny the defendants the due process of law.

For the purposes of this motion this court must review the facts in the light most favorable to the Government.[25]

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[25] Any discussion of facts in the text is based upon this presumption. It should not be presumed, for any other purpose, that this court accepts the representations of the Government as to any alleged criminal activities or predisposition.

It is alleged that Horwitz and Weisman had been involved in a plan to arrange for a certain corporation (the "Corporation") to purchase 20,000 shares of the Theatre's stock by a $50,000 cash bribe to two officers of the Corporation. After the sale of the stock the Theatre was reimbursed by the Corporation, to be covered in part by an invoice of $30,000 to the law firm of informant Brodsky for legal services which had not been performed. During the grand jury investigation into this and related matters, Weisman told Brodsky that he would arrange for Horwitz to contact him so that they could get their stories straight. On two occasions Horwitz and Brodsky discussed the plan; at the conclusion of the second meeting Brodsky promised Horwitz he would keep him informed of what he was doing with respect to the grand jury investigation. Brodsky thereafter agreed to cooperate with the Government, wore a body recorder, and agreed to a wiretap of his telephone.

Based upon the information supplied to the Government by Brodsky, the Government had reason to believe that Horwitz and Weisman were counselling each other in an attempt to prevent the grand jury from learning the facts with respect to the payment by the Corporation. As part of his cooperation, Brodsky fabricated a story that his former law partner had been called to testify before the grand jury and that he needed some information, more specifically some names of employees of the Corporation, so that his former partner could answer questions by the grand jury as to the nature of the alleged legal work and the officer of the Corporation involved. It is in this presumed context that the assertions of Weisman and Horwitz must be viewed.

The Government did not implant the criminal design in the minds of Horwitz and Weisman; it merely con-

ceived of a plan whereby it could obtain further evidence of such scheme. This was not a trap for the unwary innocent, but rather for the unwary. *See Sherman v. United States,* 356 U.S. 369, 372, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). The use of deceit to obtain evidence of the crime is proper, "for there are circumstances when the use of deceit is the only practicable law enforcement technique available." *United States v. Russell, supra* 411 U.S. at 436, 93 S.Ct. at 1645; *see also Osborn v. United States,* 385 U.S. 323, 326, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966). Furthermore, the technique used by the Government did not involve activities that resulted in unjury to the rights of innocent citizens, a concern expressed by Judge Friendly in *United States v. Archer,* 486 F.2d 670, 677 (2d Cir. 1973).

A review of the transcripts of the recorded conversations indicates that Weisman confirmed his participation in the plan without cajoling, enticement or duress by Brodsky. Weisman's allegation to the contrary is rejected. *See United States v. Viviano, supra,* 437 F.2d at 299.

Although defendant Horwitz presents a more difficult factual setting, a review of all the transcripts of the recorded conversations between Brodsky and Horwitz indicates that although Horwitz did not supply Brodsky with names until their second meeting (and after six telephone conversations) he did not resist any suggestions that the grand jury investigation be impeded and the facts, alleged to be true, be concealed. In fact, Horwitz appears to support the "story" that was already developed—that the legal fees were for some work with respect to a cable television deal, possibly some acquisitions, that Brodsky had lost his file as to any work done, that it was a legitimate fee since it had been recorded on Brodsky's tax return and that his recollection of five years ago was poor.

It appears that his refusal to give names to Brodsky connotes not so much a desire not to do so, as his inability to get any names from the Corporation. The repeated attempts by Brodsky to get him to give names are not so outrageous as to be a denial of due process. They are properly a consideration for the jury in determining the element of propensity. *See United States v. Viviano, supra,* 437 F.2d at 299 n.2.

Defendant Horwitz has also moved to dismiss Count XXIV of the Indictment on the basis of two alleged irregularities before the grand jury. Horwitz asserts the Indictment should be dismissed for the failure of the Assistant United States Attorney to give appropriate instructions to the grand jury as to the law concerning the affirmative defense of entrapment and for the alleged failure to play seven of the eight tape recorded conversations between Brodsky and Horwitz. Horwitz has cited no direct authority for this proposition and, indeed, the rule appears to the contrary. An indictment valid on its face "is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *United States v. Calandra,* 414 U.S. 338, 345, 94 S.Ct. 613, 618, 38 L.Ed.2d 561 (1974). *See also United States v. Guillette,* 547 F.2d 743, 752 (2d Cir. 1976), *cert. denied,* 434 U.S. 839, 98 S.Ct. 132, 54 L.Ed.2d 102.

Horwitz claims that the grand jury was deprived of its ability to " 'acting independently of either prosecuting attorney or judge,' " and a denial of the constitutional guarantee that the grand jury be a "protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." (sic) *United States v. Dionisio,* 410 U.S. 1, 16-17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1972) (citation omitted). These tapes and an instruction

on the relevant law, according to Horwitz, would have established his defense of entrapment.

Normally, the prosecutor is under no duty to inform the grand jury of facts which would form the basis of a defense at trial. 8 *Moore's Federal Practice* ¶6.03[2] at 6-40 (1977). *See United States v. Ruyle,* 524 F.2d 1133, 1136 (6th Cir. 1975), *cert. denied,* 425 U.S. 934, 96 S.Ct. 1664, 48 L.Ed.2d 175 (1976) (defendant not entitled to challenge indictment "on the ground that information which he considered favorable to his defense was not presented to the grand jury"). The grand jury's duty is to hear the State's evidence in order to decide whether the evidence is sufficient to warrant putting a person on trial for a crime. *Cobbs v. Robinson,* 528 F.2d 1331, 1338 (2d Cir. 1975).

The authorities relied upon by Horwitz do not alter the general proposition just set forth. In both *United States v. Provenzano,* 440 F.Supp. 561, 566 (S.D.N.Y.1977) and *United States v. Phillips Petroleum Company,* 435 F.Supp. 610, 621 (N.D.Okl.1977), the courts dismissed indictments because of the failure of the prosecutor to present evidence to the grand jury which would directly contradict the testimony of key witnesses upon whom the indictments were based. In *United States v. Estepa, supra,* 471 F.2d at 1132, the court dismissed an indictment because the prosecuting attorney failed to advise the grand jury that key testimony establishing probable cause of a criminal act was based entirely on hearsay. Under these holdings evidence, known to the prosecutor, which tends to establish that the alleged criminal act did not occur must be disclosed. After noting the absence of any legal obligation to present exculpatory evidence to the grand jury under *United States v. Y. Hata Co.,* 535 F.2d 508, 512 (9th Cir. 1976), *cert, denied,* 429 U.S. 828, 97 S.Ct. 87, 50 L.Ed.2d 92; *Loraine v. United*

States, 396 F.2d 335, 339 (9th Cir.), *cert. denied,* 393 U.S. 933, 89 S.Ct. 292, 21 L.Ed.2d 270 (1968), the Department of Justice guidelines require a prosecutor with personal knowledge of "substantial evidence which directly negates the guilt of a subject of the investigation" to present such evidence. Guidelines of the United States Department of Justice, issued December 16, 1977. For the reasons already set forth, *supra,* a review of the tapes in question by this court establishes that the affirmative defense of entrapment does not directly negate the charge against Horwitz, nor do the tapes alone as the record now stands constitute substantial evidence to that effect. Moreover, no authorities have been presented to this court which require production and review of the grand jury evidence and instructions relating to the subjective disposition of Horwitz to commit a crime. The motion to seek such a result is denied. *United States v. DeMarco,* 401 F.Supp. 505, 513 (C.D.Cal.1975), *aff'd,* 550 F.2d 1224 (9th Cir. 1977), relied upon by Horwitz, fails to persuade this court that advice and evidence relating to a defendant's affirmative defense must be submitted to a grand jury, even though dismissal of the indictment as a malicious prosecution brought for improper purposes appears justifiable.

UNITED STATES of America

v.

Gregory J. DePALMA, Eliot H. Weisman, Richard Fusco, a/k/a "Nerves", Murad Nersesian, a/k/a "Mike Fusco" and "Mickey Coco", Leonard Horwitz, a/k/a "The Fox", Laurence I. Goodman, Salvatore J. Cannatella, Louis Pacella, a/k/a "Louie Dome", Anthony Gaggi, a/k/a "Nino", and Thomas Marson, Defendants.

No. 78 Cr. 401.

United States District Court,
S. D. New York.

Sept. 21, 1978.

OPINION

SWEET, District Judge.

In an omnibus motion, all defendants in this multicount indictment alleging a pattern of racketeering activity and securities fraud and bankruptcy fraud conspiracies in connection with the operation of the Westchester Premier Theatre (the "Theatre") have moved, pursuant to Rule 41(b), Fed.R.Crim.P., and 18 U.S.C. § 2518(10)(a), for an order suppressing evidence obtained as a result of electronic surveillance authorized by five court orders:

a. An order signed March 10, 1977 by the Honorable Malcolm Lucas of the Central District of California ("Order #1");

b. An order signed April 8, 1977 by Judge Lucas ("Order # 2");

c. An order signed May 5, 1977 by the Honorable Whitman Knapp of the Southern District of New York ("Order # 3");

d. An order signed June 21, 1977 by Judge Knapp ("Order # 4"); and

e. An order signed June 28, 1977 by Judge Knapp ("Order # 5").

The defendants have moved to suppress this wiretap evidence on the basis of the affidavits relied upon by the courts for issuance of the orders, failure of the Government to minimize properly the interception of nonpertinent communications, improper security surrounding the making and storage of tapes prior to sealing and failure to amend properly the orders.

In addition, defendant Weisman has moved to dismiss the indictment against him on the ground that the

Government improperly utilized testimony Weisman had given in prior proceedings under an alledged grant of immunity. Weisman has also moved to suppress certain post-arrest statements made by him which the Government is alleged to have improperly obtained.

This court held hearings on August 8, 9, 10, 11, 28 and 29 with regard to factual issues raised by these motions. For the reasons stated below, defendants' motion to suppress evidence obtained through the five court ordered wiretaps is denied. The motions of defendant Weisman are granted with respect to certain statements and denied as to others.

The background of this action, including the allegations of the Indictment, have been set forth in this court's opinion of August 26, 1978 and will not be repeated here. As part of the Government's investigation of the alleged illegal activities which resulted in the instant Indictment, five wiretap orders, two in California and three in New York, were obtained and it is the fruits of these wiretaps which the defendants seek to exclude in this case.

* * *

II. *Weisman's Motions*

Use of Immunized Testimony.

On November 17, 1975 defendant Weisman testified before a New York State grand jury, allegedly about matters concerning the Theatre. Subsequently Weisman testified before the Honorable Harold Schwartzberg, United States Bankruptcy Judge, in the *Matter of the Westchester Premier Theatre, Inc.* (Docket No. 76 B 2926), a proceeding under Chapter XI of the Bankruptcy Act. This court held an evidentiary hearing to determine whether the grand jury proceedings which resulted in the present Indictment were tainted by the use of immunized

testimony. After a review of all the evidence, including that submitted by the prosecution for in camera review,[40] it is the opinion of this court that there was no use of Weisman's testimony by the Government in obtaining the Indictment.

First, as to the New York State grand jury proceeding, Weisman signed a waiver of immunity form. Weisman having testified without any immunity, the Government would be free to use Weisman's testimony and therefore there is no taint.

As to Weisman's testimony in the bankruptcy proceeding, Weisman testified as an officer of the bankrupt corporation, not as the debtor in possession. According to the sworn testimony of Judge Schwartzberg, Weisman was not testifying under any grant of immunity; he was not designated by the court to perform the duties imposed upon the bankrupt. See *United States v. Castellano,* 349 F.2d 264, 273 (2d Cir. 1965), *cert. denied,* 383 U.S. 928, 86 S.Ct. 934, 15 L.Ed.2d 847 (1966); *United States v. Coyne,* 425 F.Supp. 171 (W.D.N.Y.1977). Therefore, there could be no taint resulting from Weisman's testimony in the bankruptcy proceeding.

Furthermore, the Government has satisfied this court that there was no use of Weisman's testimony in the bankruptcy proceeding in the investigation which led to the present Indictment. At the evidentiary hearing before this court the testimony of the Assistant United States Attorney in charge of this case negated any taint as to the Government's use of Weisman's testimony and stated affirmatively the sources of the evidence presented to the grand jury, namely, wiretaps, informants' evidence and the statements of certain of the co-conspirators. A review

[40] This *in camera* review included the material relating to the 1975-1976 investigation, and 1977 bankruptcy files of the FBI.

of the *in camera* information submitted to this court has established that the Government obtained the Indictment from legitimate sources independent of any of the Weisman testimony before the Bankruptcy Court, whether or not it was immunized. Therefore, the Government has satisfied its affirmative burden. See *United States v. Nemes,* 555 F.2d 51 (2d Cir. 1977). The Indictment will not be suppressed.

Weisman's Motion to Suppress.

Defendant Weisman has moved to suppress certain statements made subsequent to his arrest on September 16, 1977 on a warrant charging him with violating Title 18, United States Code, Section 1014, relating to bank fraud, a charge unrelated to the present Indictment. The complaint upon which the warrant was issued alleges that on or about February 6, 1976, Weisman and his wife knowingly made false statements in an application to obtain a bank loan to purchase certain property. Weisman asserts that the complaint was issued without probable cause and that the interrogation subsequent to his arrest (i) was therefore an unreasonable search and seizure, in violation of his Fourth Amendment rights, (ii) was under circumstances rendering the statements involuntary, abrogating his Fifth Amendment rights and (iii) was without the presence of counsel, abridging his Sixth Amendment rights.

The warrants for the arrest of Weisman and his wife were issued on September 13, 1977 after a finding of probable cause by a Magistrate of this court. Weisman was thereafter kept under surveillance, and it was decided not to make the arrest while he was in the company of others. At approximately 3:00 p. m. on Friday, September 16, 1977, Weisman was alone in his car and was arrested.

He was advised of the charge against him and was given his full *Miranda* warnings en route to FBI headquarters.

Upon arrival at FBI headquarters, he was shown an advice of rights form after being photographed and fingerprinted. During processing Weisman asked when he could place a call to his attorney and was told he could do so after the processing was completed. After processing he signed a Waiver of Rights form.[41] No call was placed to his attorney,[42] and he was not arraigned.

Weisman was then taken to an office in local FBI headquarters. At approximately 5:00 p. m. the Assistant United States Attorney arrived, again advised Weisman of his constitutional rights and informed him of the charges against him and his wife, including the possible racketeering charge against him and potential 20 year jail term thereunder.[43] Weisman was informed that although the

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[41] The form states as follows:

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

[42] The Government treated this not as a request, but simply as an inquiry as to when he could call should he desire to do so. Upon completion of processing the Government should have informed Weisman that he was free to call his attorney.

[43] Assistant United States Attorney Akerman testified as follows:

Q. Mr. Akerman, have you given some instructions to Agent Fisk on September 16th to have him hold Mr. Weisman for your arrival?

A. No, I didn't instruct him to hold him for my arrival.

Q. Did you tell him you wanted him to wait until you had the opportunity to question Mr. Weisman?

A. No, because I was planning to be there at the same time that Mr. Weisman was brought there.

Q. Did you tell Mr. Fisk to have Mr. Weisman brought forthwith for arraignment?

A. No, I did not.

Q. You wanted to question him that night, did you not?

A. That's correct. Tr. 752, line 21-753, line 11.

Government could not make any promises, if he cooperated it would become known to the judge.[44]

Thereafter, Weisman was questioned, sometimes with as many as four people in the room. During the interrogation Weisman called his wife and asked her to meet him at FBI headquarters. Mrs. Weisman arrived at approximately 6:45 p. m., at which time she was advised by the Assistant United States Attorney of the warrant for her arrest and of her constitutional rights. Mrs. Weisman spoke to Weisman for a few minutes and placed a call to defendant DePalma; then Weisman requested that she leave the room. Mrs. Weisman remained in a waiting room while the questioning of Weisman continued until approximately 10:45 p. m. Weisman, due to his cooperation, was then permitted to return home with his wife.

The next day, a Saturday, Weisman was arraigned by the Honorable Whitman Knapp at his apartment. Weisman had expressed a fear that if he were arraigned publicly and not later prosecuted on that charge, certain others would suspect he was cooperating with the Government. At arraignment Judge Knapp informed Weisman of the complaint against him and of his constitutional rights. Weisman was then released on his own recognizance. Because Weisman feared for his physical safety, the complaint was sealed.

On Monday, September 19, 1977, Weisman met with the Assistant United States Attorney and two FBI agents at a motel in Connecticut which Weisman had chosen to assure secrecy. Prior to any conversation Weisman was again advised of his constitutional rights, and he signed

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[44] Agent Fisk testified as follows:

Q. What was said next, Agent Fisk?

A. I don't recall exactly what was said next, but you asked for Mr. Weisman's cooperation in the cases.

Q. What else did I tell him about his cooperation?

A. You told him you couldn't make any promises to him and that his cooperation, if he did cooperate, would become known to a judge. Tr. 600, lines 2-10.

another Waiver of Rights form. Weisman then answered questions put to him by the Government agents.

The face of the complaint indicates that it was dismissed by the Government on October 2, 1977, although this date, a Sunday, appears to be erroneous. On October 4, 1977, Weisman again met with Government agents. After being advised of his constitutional rights Weisman refused to sign a Waiver of Rights form or to cooperate with the Government. He was subsequently indicted on the charges in the case sub judice.

The complaint charging bank fraud, signed by FBI agent Brendan M. Fisk ("Fisk"), alleged, in pertinent part, as follows:

> 2) On or about February 6, *1976,* an application for a home mortgage loan was submitted to the Union Savings Bank of New York, 101 Mamaroneck Avenue, Mamaroneck, New York, by the defendants ELIOT H. WEISMAN and MAXINE L. WEISMAN who are husband and wife. The loan application was signed by both defendants.
>
> 3) The loan application referred to in paragraph 2 states that the defendant ELIOT H. WEISMAN is the President of the Westchester Premier Theatre and that his annual income *is* $50,000 and that the defendant MAXINE L. WEISMAN *is* employed by the Westchester Premier Theatre, 555 White Plains Road, Tarrytown, New York and that her annual income *is* $2,000. These statements were knowingly false.
>
> 4) The payroll records of the Westchester Premier Theatre show that the defendant ELIOT H. WEISMAN earned $36,143 in *1975* from the Westchester Premier Theatre, 555 White Plains Road, Tarrytown, New York, and that the defendant MAXINE L. WEISMAN *was* not on the payroll of the

Westchester Premier Theatre in *1975.* (Emphasis added).

The complaint in paragraph 3 contains the allegation that the statements in the loan application were knowingly false, a handwritten allegation added by the Assistant United States Attorney just prior to taking the complaint to the Magistrate. The Complaint contains no facts to establish that at the time the loan application was filled out in February 1976 Weisman was not earning the amount set forth in the application.

In *Jaben v. United States,* 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed2d 345 (1964) the complaint, which was determined to set forth probable cause, alleged that the agent personally conducted an investigation in the course of which he examined defendants' tax returns, interviewed third persons and consulted public and private records as to the defendants' income. Although the complaint here, signed by Agent Fisk, states that the basis of his knowledge was "an investigation conducted in the regular course of duties" there is no allegation that he personally conducted the investigation. Fisk testified that he first learned about the bank loan charge one week prior to the preparation of the complaint and that the facts were supplied to him by the Assistant United States Attorney on the case.[45] This situation is similar to the one which

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[45] Agent Fisk testified as follows:

Q. Was it Mr. Akerman who said to you that the government had concluded that they wished to arrest Weisman on that bank loan fraud charge?

A. Yes.

Q. You certainly did not bring it to his attention.

A. No. The facts were not—I wasn't in possession of the facts. Tr. 628, lines 5-12.

Q. Did you tell the magistrate what he earned in 1976?

A. No, I don't believe I did.

Q. The charge, though, had to do with 1976, did it not?

A. I presented the complaint on the approval of Mr. Akerman, who believed the probable cause, and it was signed, sir. Tr. 633, lines 18-25.

existed in *Giordenello v. United States,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1957), since "the complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainants' belief [other than the 1975 payroll records, which are insufficient]; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made." *Id.* at 486. Neither the complaint nor the testimony indicates that Fisk had any personal knowledge or source information as to the conclusory statement concerning the falsity of Weisman's application,[46] nor do they set forth the facts to establish the criminal intent element of the crime charged. *See Pugach v. Klein,* 193 F.Supp. 630, 639 (S.D. N.Y.1961).

Although the Government alleges that at the time the complaint was prepared it had in its possession the federal tax returns of Weisman for 1975 and 1976, which indicated that in neither year did Weisman earn what was set forth in the loan application nor was his wife employed at the theatre, Fisk testified that he had reviewed only the

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[46] Agent Fisk testified as follows:

Q. Mr. Fisk, was the Government's Exhibit 1 prepared by Mr. Akerman?

A. Yes, it was.

Q. It was typed at the U.S. Attorney's office?

A. Yes, sir.

Q. Did you make any changes on it?

A. May I look at it please?

Q. Yes, sir.

A. This additional statement was written in at the time.

Q. You are referring now to the bottom of the last full paragraph on page 1, "These statemens were knowingly false"?

A. That's correct.

Q. You wrote that?

A. No, I did not.

Q. Who did?

A. Mr. Akerman.

Q. Did you initial it?

A. Yes. Tr. 635, line 17-636, line 12.

1975 return before executing the affidavit. Furthermore, information derived from the tax returns was not contained in the complaint, nor was it submitted to the magistrate in the form of sworn testimony, nor did Fisk have knowledge concerning Weisman's 1976 income. Therefore, the tax returns cannot be considered in determining probable cause; "an adequate basis for such a finding had to appear on the face of the complaint" (*Girodenello v. United States,* 357 U.S. 480 487, 78 S.Ct. 1245, 1250, 2 L.Ed2d 1503 (1957)) or from sworn testimony. Fed. R.Crim.P. 41(c). "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." (Emphasis in original). *Aguilar v. Texas, supra,* 378 U.S. at 109 n.1, 84 S.Ct. at 1511 (1963). A review of such information does not establish probable cause.

The absence of probable cause for the issuance of the warrant for the arrest of Weisman and the circumstances surrounding the arrest, require that his statements of September 16 be suppressed. The arrest afforded no lawful basis for procuring evidence with respect to an entirely different offense. *United States v. Edmons,* 432 F.2d 577, 582 (2d Cir. 1970).

A major purpose for arresting Weisman on the bank loan charge was to obtain his cooperation on the investigation into the Theatre. This is borne out by testimony at the hearing, the circumstances of the arrest, including the Government's desire to keep others involved in the Theatre from knowing of the arrest, and the interrogation of Weisman immediately subsequent to his arrest almost solely as to the Theatre. Indeed, there is evidence that on September 12, 1978, the occasion of Weisman's testimony before the grand jury, Weisman's

attorney had indicated to the Assistant United States Attorney that Weisman wished to cooperate.

The *Miranda* warnings given Weisman and his signature on a Waiver of Rights form do not cure the lack of probable cause and the need for suppression. *Brown v. Illinois,* 422 U.S. 590, 601—602, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1974).

> Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. (Quotations in original.)

Id. at 602, 95 S.Ct. at 2261. Therefore, even if the statements by Weisman were determined by this court to have been voluntary under the Fifth Amendment,[47] the casual connection between the illegal arrest and the statements must be broken in order to purge the primary taint. *Brown, supra* at 601—02, 95 S.Ct. 2254; *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1962). The determination of whether the statements were the product of free will must be determined by the facts of each case; "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant. [Footnotes and citations omitted.]" *Brown, supra* at 603—04, 95 S.Ct. at 2261—62.

Weisman's arrest, and the surrounding circumstances, were part of a plan to assure his cooperation on a totally unrelated investigation. "The arrest, both in design and

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[47] Due to the suppression based upon the Fourth Amendment this court need not address this issue.

execution, was investigatory." *Brown, supra* at 605, 95 S.Ct. at 2262. The questioning with respect to the Theatre as not merely incidental to the arrest, but one of the main purposes of the arrest.

However, a different issue is presented with respect to the statements made on Monday, September 19, 1977, more than two days after the illegal arrest. These statements fall somewhere between the second confession by the defendant in *Brown,* which was determined to be the result and fruit of the first, and that made by the defendant in *Wong Sun,* which was several days after the illegal arrest. To locate the September 19 statements on this spectrum all the surrounding facts and circumstances are relevant. *See Tanner v. Vincent,* 541 F.2d 932, 936 (2d Cir. 1976), *cert. denied,* 429 U.S. 1065, 97 S.Ct. 794, 58 L.Ed.2d 782 (1977); *United States v. Toral,* 536 F.2d 893, 896 (9th Cir. 1976).

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

United States v. Bayer, 331 U.S. 532, 540—41, 67 S.Ct. 1394, 1398, 91 L.Ed. 1654 (1946).

A review of the facts and circumstances indicates that the conditions which made Weisman's first statements inadmissible did not carry over to invalidate the subsequent statements. The second meeting was held over

two days after Weisman's arrest. Weisman had been arraigned on the bank loan charge and released on his own recognizance. The meeting at which the statements were made took place at a motel chosen by Weisman and not in FBI headquarters. Weisman appeared on his own. Weisman's wife was not present, and there was no immediate threat of her arrest. Weisman was again given his *Miranda* warnings and signed a Waiver of Rights form. These intervening circumstances dissipated the original taint; there was a sufficient break in the stream of events to insulate the later statements. *Clewis v. Texas,* 386 U.S. 707, 710, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1966).

Furthermore, Weisman is a sophisticated businessman who was fully aware of his rights and who had just testified before the grand jury and had consulted counsel in connection with that testimony. He had an opportunity over the weekend to consult with his attorney or anyone else, although there is no testimony before this court that he did so. His statements of September 16 were not recorded, other than some sketchy notes by one agent, and he signed no written confession or similar document. The statements at the second meeting appear to have resulted from a voluntary and informed decision by Weisman to cooperate with the Government, *cf. United States v. Galante,* 547 F.2d 733 (2d Cir. 1976), *cert. denied,* 431 U.S. 969, 97 S.Ct. 2930, 53 L.Ed.2d 1066 (1977); *United States v. Mullens,* 536 F.2d 997 (2d Cir. 1976), and not stimulated by a belief that he had nothing to lose. See generally *Knott v. Howard,* 511 F.2d 1060 (1st Cir. 1975). They were not the direct result and fruit of the first *Brown, supra* at 605; nor were they obtained in violation of his Fifth or Sixth Amendment rights. The September 19, 1977 statements of Weisman will not be suppressed.

SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of June, one thousand nine hundred and eighty.

UNITED STATES OF AMERICA. *Appellee,* *v.* ELIOT WEISMAN, *Appellant.*	79-1315

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

Due to his untimely death on February 16, 1980, Judge Smith, a member of the panel, did not participate in the consideration of this petition.

/s/ IRVING R. KAUFMAN
Chief Judge

IRVING R. KAUFMAN